United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD

COURT OF APPEALS, DISTRICT OF COLUMBIA

JANUARY TERM, 1930

799

No. 5124

UNITED STATES OF AMERICA, APPELLANT

vs.

CASSIE S. BARDWELL, BENEFICIARY OF EMORY CHESTER BARDWELL, DECEASED

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JANUARY 7, 1930

COURT OF APPEALS, DISTRICT OF COLUMBIA

JANUARY TERM, 1930

No. 5124

UNITED STATES OF AMERICA, APPELLANT

vs.

CASSIE S. BARDWELL, BENEFICIARY OF EMORY CHESTER BARDWELL, DECEASED, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX

	Original	Print
Caption	a	1
Declaration	1	1
Defendant's amended plea to the declaration	4	2
Demurrer	7	4
Demurrer sustained; judgment ordered; judgment; appeal noted	9	5
Assignment of errors	9	5
Designation of record	10	6
Clerk's certificate	11	6

a Supreme Court of the District of Columbia

CASSIE S. BARDWELL, BENEFICIARY OF EMORY Chester Bardwell, deceased, plaintiff
vs.
UNITED STATES OF AMERICA, DEFENDANT
} No. 76852 At Law

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration*

Filed June 21, 1929

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

CASSIE S. BARDWELL, BENEFICIARY OF EMORY Chester Bardwell, deceased, plaintiff,
vs.
UNITED STATES OF AMERICA, DEFENDANT
} Law No. 76852

Comes now the plaintiff, Cassie S. Bardwell, widow of the beneficiary, named in a certain war risk insurance policy of Emory Chester Bardwell, deceased, and for cause of action against the defendant says that while the said Emory Chester Bardwell, deceased, was employed as a soldier in the Army of the United States he made application for and was granted a contract of war risk insurance, by the terms of which policy the said defendant, through its lawful officer, representative, and agent, contracted and agreed to pay the insured, in the event he became permanently and totally disabled from following a gainful occupation within the lifetime of said policy the sum of $10,000.00 in equal installments of $57.50 per month; that subsequently thereto the said policy of insurance lapsed for nonpayment of premiums, and later on the said insured, after being discharged from the service of the Army of the United States, applied for reinstatement of his said policy of said insurance, and his application was accepted by said defendant, through its lawful officer, representative, and agent, the lapsed premiums paid
2 thereon and the said policy of insurance was reinstated; that subsequent to the acceptance of the said reinstatement application the insured was regarded and classified as permanently and totally disabled by the medical officer, representative, and agent of said defendant, and upon such rating the said insured was awarded and paid monthly insurance installments from the 12th day of August, 1925, to the date of his death, the 28th day of June, 1927, at the rate of $57.50 each; that upon receipt of due proof of the death of said insured the said defendant, through its officer, representative, and agent, the Director of the United States Veterans' Bureau, proceeded to award the remainder of the said insurance to Mrs. Cassie S.

Bardwell, the designated beneficiary under said policy of insurance, and a short time subsequent thereto the said defendant, through its officer, representative, and agent, the Director of the United States Veterans' Bureau, refused to award the remainder of the said insurance to Mrs. Cassie S. Bardwell, the said beneficiary, and for that, while said policy was in full force and effect, the said insured having performed fully his part of said contract and having paid all premiums due and payable thereon, he became and was permanently and totally disabled from following a gainful occupation from the 12th day of August, 1925, to the date of his death as aforesaid; which said permanent and total disability was continuous from said date, August 12, 1925, to the date of his death as aforesaid; that because of said permanent and total disability the said insured or his beneficiary, after his death, was entitled to have and receive monthly payments of $57.50 each, as aforesaid, from said 12th day of August, 1925, to the date of the filing hereof; that his said beneficiary has made frequent requests and demands upon defendant,
3 through its officer, representative, and agent, the Director of the United States Veterans' Bureau; that the said defendant, through its said officer, representative, and agent, the Director of the United States Veterans' Bureau, has continuously and repeatedly refused and now refuses to award the remainder of the said insurance to the said beneficiary, or to make the said payments as aforesaid, while said defendant, through its said officer, representative, and agent, the Director of the United States Veterans' Bureau, has acknowledged and does acknowledge that the said insured was permanently and totally disabled from said 12th day of August, 1925, to the date of his death, the 28th day of June, 1927.

Wherefore a disagreement exists between the said beneficiary of the said insured and the said defendant, through its officer, representative, and agent, the Director of the United States Veterans' Bureau, concerning an award of insurance due the said beneficiary of said insured, and plaintiff prays that she recover from the said defendant the sum of $1,380.00, representing twenty-four monthly installments of insurance, covering twenty-four months from June 28, 1927, to the date of the filing hereof, at the rate of $57.50 per month, which said sum the said beneficiary and plaintiff herein claims to be due from said defendant as the designated beneficiary of the said insured, now deceased, as aforesaid, with interest thereon and the costs of this suit.

CASSIE S. BARDWELL,
Plaintiff.

Subscribed and sworn to before me this 19th day of June, A. D 1929.

[SEAL] SAMUEL J. L'HOMMEDIEU,
Notary Public, D. C.

JAMES B. FLYNN,
THOS. J. LUCKETT,
Attorneys for Plaintiff.

4 Service accepted June 21st, 1929.

LEO A. ROVER,
G.,
U. S. Atty.

Defendant's Amended Plea to the Declaration

Filed October 30, 1929

* * * * * * *

Now comes the defendant, the United States of America, by its attorney, Leo A. Rover, United States attorney in and for the District of Columbia, and for its amended plea to the declaration filed herein says:

1. The defendant admits Emory Chester Bardwell while serving in the military forces of the defendant applied for and was granted a contract of war risk term insurance in the amount of ten thousand dollars ($10,000); admits that subsequent thereto said policy of insurance lapsed for nonpayment of premiums and admits that later and on, to wit the 4th day of May, 1925, the said Emory Chester Bardwell applied to the defendant's officers and agents for reinstatement of his said policy of insurance. The defendant denies that said application was accepted by said defendant and says that its officers and agents erroneously marked the said application acceptable on May 25, 1925, and admits that premiums were paid thereafter as alleged. The defendant admits that subsequent to the action taken on the application for reinstatement by its officers and agents aforesaid, and on, to wit, the 12th day of August 1925, the said Emory Chester Bardwell was regarded and classified as permanently and totally disabled. The defendant admits that installments of insurance
5 in the amount of fifty-seven dollars and fifty cents ($57.50) each were paid to the said plaintiff from and after the 12th day of August, 1925, to the date of his death, June 28, 1927, under the invalid reinstatement which said payments were wholly without authority of law. The defendant admits that thereafter the defendant's officer and agent, the Director of the United States Veterans' Bureau, awarded to Mrs. Cassie S. Bardwell, the designated beneficiary of the said policy of insurance installments accruing after the death of the insured, and that a short time subsequent thereto the said defendant refused to award the said remainder of the said insurance to Mrs. Cassie S. Bardwell.

Defendant denies that the plaintiff became permanently and totally disabled from the 12th day of August, 1925, and says that the said plaintiff was permanently and totally disabled long prior to the said 12th day of August, 1925, to wit, the 22nd day of January, 1925. The defendant denies that because of said permanent and total disability the insured or his beneficiary became entitled to receive fifty-seven dollars and fifty cents ($57.50) from the 12th day of August, 1925, for the reason that the said insurance was reinstated erroneously and illegally, and the defendant denies each and every other allegation of the petition herein except that the defendant admits that it has refused and still refuses to pay to the plaintiff any installments of insurance and admits that there is a disagreement between the United States Veterans' Bureau and the plaintiff herein as to her claim under the said contract.

Further answering and as a complete defense to this action, the defendant says that at the time the plaintiff filed his said application and at the time it was marked acceptable by the
6 defendant's officers and agents the plaintiff was suffering from

disability due to his military service and was rated less than permanently and totally disabled by the Veterans' Bureau; that under the provisions of section 304 of the World War veterans' act and the regulations promulgated thereunder the insured, to be entitled to reinstate his said war risk insurance, among other things was required to submit proof satisfactory to the Director of the Veterans' Bureau that he was not permanently and totally disabled; that at the time the insured filed his said application as aforesaid and at the time it was marked acceptable as aforesaid the evidence submitted to the Director of the Veterans' Bureau by the insured and in possession of said director was insufficient to show to the satisfaction of the director that the said insured was not permanently and totally disabled; that the insured was thereafter on, to wit, the 28th day of July, 1925, medically examined, the action of the bureau was reconsidered, and on the 12th day of August, 1925, it was finally determined by the Director of the United States Veterans' Bureau that the insured was permanently and totally disabled from the 22nd day of January, 1925; that the insured was permanently and totally disabled at the time he filed his said application for reinstatement as aforesaid and at the time the said application was marked accepted; that the insured was not entitled to reinstate his said war risk insurance; that the action of the defendant's officers and agents, in marking said application reinstated and issued a new contract was an act in excess of the statutory authority conferred upon them and was contrary to law and void, and the insured had no war risk insurance in force and effect at any time subsequent to the 1st day of
7 June, 1920; after the death of the insured the plaintiff was advised that the action of the Veterans' Bureau reinstating said insurance was erroneous, was contrary to law and void, and that the same had been cancelled.

LEO A. ROVER,
United States Attorney.
JOHN W. FIHELLY,
Assistant United States Attorney.

Of counsel:
ANNABEL HINDERLITER,
Attorney, U. S. Veterans' Bureau.

Demurrer

Filed November 6, 1929

* * * * * * *

Comes now the plaintiff, Cassie S. Bardwell, by her attorneys, James B. Flynn and Thomas J. Luckett, and says that the amended plea of the defendant filed in the above-entitled cause, on the 30th day of October, 1929, is bad in substance, and for reasons thereof states as follows:

1. That said amended plea fails to state sufficient facts to constitute a good defense to the plaintiff's declaration.

2. That the said amended plea attempts to plead without qualification a conclusion of law as a matter or conclusion of fact.

3. That the said amended plea does not comply with section 2, rule 23, of the rules of the Supreme Court of the District of Columbia.

4. That said amended plea sets up no defense to plaintiff's
8 declaration in that it is contrary to provisions of section 307, of the World War veteran act of 1924.
5. And for other reasons apparent on the face of the record.

JAMES B. FLYNN,
THOS. J. LUCKETT,
Attorneys for Plaintiff.

Notice of hearing on demurrer

To Messrs. LEO A. ROVER, JOHN W. FIHELLY,
and A. HINDERLITER,
Attorneys for Defendant.

Please take notice that the above demurrer will be up for hearing on Friday, the 15th day of November, A. D. 1929, in the Circuit Court of the Supreme Court of the District of Columbia at 10 a. m. or as soon thereafter as counsel can be heard.

JAMES B. FLYNN,
THOS. J. LUCKETT,
Attorneys for Plaintiff.

Service of the aforegoing accepted this 6th day of November, 1929, A. D.

LEO A. ROVER,
JOHN W. FIHELLY,
Attorneys for Defendant.

Supreme Court of the District of Columbia

FRIDAY, NOVEMBER 15TH, 1929.

Session resumed pursuant to adjournment, Hon. JENNINGS BAILEY, Justice, presiding.

* * * * * * *

Come now the parties hereto by their respective attorneys of record; whereupon the demurrer filed herein to defendant's amended
9 plea being considered, it is ordered that the same be, and it is hereby, sustained. The defendant, by its said attorneys thereupon, elects to stand and judgment is ordered.

Wherefore it is considered that plaintiff recover of defendant herein the sum of thirteen hundred and eighty dollars ($1,380.00), with interest from this date, together with costs of suit to be taxed by the clerk and have execution thereof. Defendant's attorney notes an appeal in open court.

Assignment of errors

Filed December 4, 1929

* * * * * * *

Now comes the defendant, the United States of America, by its attorney, Leo A. Rover, United States Attorney in and for the District of Columbia, and assigns as errors herein, the following:

1. The court erred in holding that plaintiff had the right to reinstate his contract of war-risk insurance at a time when he was permanently and totally disabled.

2. The court erred in holding that the incontestable clause provided in section 307 of the World War veterans' act, 1924, as amended, was not suspended by the happening of the contingency insured against within six months from date of issuance of the reinstated contract of insurance when such happening of the contingency was found by the Veterans' Bureau within six months of the date of the reinstatement of the contract and so rated.

3. The court erred in sustaining plaintiff's demurrer to the defendant's amended plea.

LEO A. ROVER,
U. S. Attorney.
JOHN W. FIHELLY,
Assistant United States Attorney.

10 Service of copy of the foregoing assignment of errors accepted this 3rd day of December, 1929.

JAMES B. FLYNN.

Designation of record

Filed December 4, 1929

* * * * * * *

The clerk will please include in the transcript of record on appeal to the Court of Appeals of the District of Columbia the following:

1. Plaintiff's declaration.
2. Defendant's amended plea to the declaration.
3. Plaintiff's demurrer to defendant's amended plea.
4. Minute entry of judgment sustaining demurrer.
5. Minute entry of judgment showing notation of appeal in open court.
6. Assignment of errors.
7. This designation.

LEO A. ROVER,
United States Attorney.
JOHN W. FIHELLY,
Assistant United States Attorney.

Service of copy of the foregoing designation of record accepted this 3rd day of December, 1929.

JAMES B. FLYNN.

11 Supreme Court of the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 10, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 76852 at law, wherein Cassie S. Bardwell, beneficiary of Emory Chester Bardwell, deceased, is plaintiff and United States of America is defendant, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court at the city of Washington, in said District, this 4th day of January, 1930.

[SEAL.] FRANK E. CUNNINGHAM, *Clerk.*

[Indorsement on cover:] District of Columbia Supreme Court. No. 5124. United States of America, appellant, vs. Cassie S. Bardwell, beneficiary, &c. Court of Appeals, District of Columbia. Filed Jan. 7, 1930. Henry W. Hodges, clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1930

COURT OF APPEALS,
DISTRICT OF COLUMBIA
FILED

APR 16 1930

Henry W. Hodges
CLERK.

No. 5124

In the Court of Appeals of the District of Columbia

JANUARY TERM, 1930

UNITED STATES OF AMERICA, APPELLANT

v.

CASSIE S. BARDWELL, BENEFICIARY OF EMORY CHESTER BARDWELL, DECEASED

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT

LEO A. ROVER,
United States Attorney.

JOHN W. FIHELLY,
Assistant United States Attorney.

J. O'C. ROBERTS,
Assistant General Counsel.

JAMES T. BRADY,
Attorney, United States Veterans' Bureau.

INDEX

	Page
Statement of the case	1
Assignment of errors	2
Pertinent statutes and regulations	3
Argument	6

CASES CITED

Duplex Printing Co. v. *Emil J. Deering*, 254 U. S. 443	9
Helmholz et al. v. *Horst et al.*, 294 Fed. 417	11
Illinois Surety Co. v. *U. S.*, 249 U. S. 214; 60 L. Ed. 609	11
Jenkins v. *U. S.*, 24 Fed. (2d) 452	12
Jordan v. *U. S.*, 36 Fed. (2d) 43	14
Monahan v. *Metropolitan Life Insurance Co.*, 283 Ill. 136, L. R. A. 1918 D. 1196	8
Mutual Reserve Fund Life Association v. *Austin*, 142 Fed. 398, 6 L. R. A., N. S. 1064	8
Sawyer v. *U. S.*, 10 Fed. (2d) 416	11
Silberschein v. *U. S.*, 266 U. S. 221	15
White v. *U. S.*, 270 U. S. 175, 180	11, 15
U. S. v. *Banks*, 36 Fed. (2d) 47	14
U. S. v. *Cerecedo Hermanos Y Compania*, 209 U. S. 337; 52 L. Ed. 821	12
U. S. ex rel. Finley v. *Hines*, 25 Fed. (2d) 554	15
U. S. v. *Jensen*, 36 Fed. (2d) 47	14
U. S. v. *Meadows*, 32 Fed. (2d) 440	14
U. S. v. *Salisbury*, 36 Fed. (2d) 47	14

OTHER CITATIONS

Black on Interpretation of Law, sec. 165	9
Congressional Record, vol. 64, pt. 5, pp. 5195, 5196	10
Opinions General Counsel, Veterans' Bureau, vol. 28, p. 1440	11

107162—30——1

In the Court of Appeals of the District of Columbia

JANUARY TERM, 1930

No. 5124

UNITED STATES OF AMERICA, APPELLANT

v.

CASSIE S. BARDWELL, BENEFICIARY OF EMORY Chester Bardwell, deceased

---

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The plaintiff below is the widow and beneficiary of Emory Chester Bardwell, the insured. The insured was granted $10,000 War Risk Term Insurance while in the military service of the defendant. This insurance lapsed June 1, 1920, for nonpayment of premium, and thereafter, and on May 4, 1925, the insured applied for reinstatement of said insurance. The application for reinstatement was marked acceptable on May 25, 1925, by officers and agents of the defendant. On August 12, 1925 (within six

months from the aforesaid acceptance by the officers and agents of the defendant), the Director of the United States Veterans' Bureau determined that the insured was then permanently and totally disabled and had been permanently and totally disabled from the twenty-second day of January, 1925 (a date prior to the acceptance of said application for reinstatement). None of the foregoing facts are in dispute. The Veterans' Bureau on an erroneous interpretation of the law awarded to the insured monthly payments of $57.50 to the date of his death, but following the death of the insured, monthly installments were refused to the plaintiff below, Mrs. Cassie S. Bardwell. The plaintiff was advised that the reinstatement was erroneous; that further payments would not be made; that the issuance of the reinstated policy was contrary to law; and that said policy was void and had been canceled. The plaintiff then brought this suit. The Declaration was filed June 21, 1929. (R. 1.) The Defendant's Amended Plea was filed October 30, 1929 (R. 3), to which the plaintiff filed a Demurrer, November 6, 1929 (R. 4). After hearing on the Demurrer the Court entered judgment for the plaintiff (R. 5), to which the defendant noted an appeal in open Court (R. 5).

ASSIGNMENT OF ERRORS

1. The Court erred in holding that plaintiff had the right to reinstate his contract of war-risk insurance at a time when he was permanently and totally disabled.

2. The Court erred in holding that the incontestable clause provided in section 307 of the World War Veterans' Act, 1924, as amended, was not suspended by the happening of the contingency insured against, within six months from date of issuance of the reinstated contract of insurance, when such happening of the contingency was found by the Veterans' Bureau within six months of the date of the reinstatement of the contract and so rated.

3. The Court erred in sustaining plaintiff's demurrer to the defendant's amended plea.

PERTINENT STATUTES AND REGULATIONS

The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act and all decisions of questions of fact affecting any claimant to the benefits of Titles II, III, or IV of this Act, shall be conclusive, except as otherwise provided herein. (Section 5, W. W. V. A., 1924, 43 Stat. 608.)

Upon its own motion or upon application the bureau may at any time review an award and, in accordance with the facts found upon such review, may end, diminish, or increase the compensation previously awarded, or, if compensation is increased, or if compensation has been refused, reduced, or discon-

tinued, may (subject to the provisions of section 210 hereof) award compensation in proportion to the degree of disability sustained as of the date such degree of disability began, but not earlier than the date of discharge or resignation. Except in cases of fraud participated in by the beneficiary, no reduction in compensation shall be made retroactive, and no reduction or discontinuance of compensation shall be effective until the 1st day of the third calendar month next succeeding that in which such reduction or discontinuance is determined. (Section 205, W. W. V. A., 1924, 43 Stat. 622.)

That the Director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. (Section 402 of the Act of October 6, 1917, 40 Stat. 409.)

Not later than five years after the date of the termination of the war, as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. (Section 404 of the Act of October 6, 1917, 40 Stat. 410.)

This insurance is subject in all respects to the provisions of such act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with this policy, the application therefor, and the terms and conditions published under authority of the act, shall constitute

the contract. (Regulation, Bulletin No. 1, promulgated October 15, 1917.)

In the event that all provisions of the rules and regulations other than the requirements as to the physical condition of the applicant for insurance have been complied with an application for reinstatement, in whole or in part, of lapsed or cancelled yearly renewable term insurance or United States Government life insurance (converted insurance) hereafter made may be approved if made within one year after the passage of this amendatory Act or within two years after the date of lapse or cancellation: *Provided*, That the applicant's disability is the result of an injury or disease, or of an aggravation thereof, suffered or contracted in the active military or naval service during the World War: *Provided further*, That the applicant during his lifetime submits proof satisfactory to the Director showing that he is not totally and permanently disabled. (Section 304 of the World War Veterans' Act 1924, as amended, 44 Stat. 799.)

Subject to the provisions of Section 29 of the War Risk Insurance Act and amendments thereto policies of insurance heretofore or hereafter issued in accordance with Article IV of the War Risk Insurance Act shall be incontestable after six months from date of issuance, or reinstatement, except for fraud or nonpayment of premiums. (Section 411 of the War Risk Insurance Act as amended by the Act of August 9 1921, 42 Stat. 157.)

All such policies of insurance heretofore or hereafter issued shall be incontestable after the insur-

ance has been in force six months from the date of issuance or reinstatement, except for fraud or nonpayment of premiums and subject to the provisions of Section 23: *Provided*, That a letter mailed by the Bureau to the insured at his last-known address informing him of the invalidity of his insurance shall be deemed a contest within the meaning of this section: *Provided further*, That this section shall be deemed to be in effect as of April 6, 1917. (Section 411 of the War Risk Insurance Act as amended March 4, 1923, 42 Stat. 1527; now Section 307 of the World War Veterans' Act 1924, 43 Stat. 627.)

ARGUMENT

Section 307 of the World War Veterans' Act (43 Stat. 627) is the keystone of this case. Said Section reads:

> All such policies of insurance heretofore or hereafter issued shall be incontestable after the insurance *has been in force six months* from the date of issuance or reinstatement, except for fraud or nonpayment of premiums and subject to the provisions of section 23: *Provided*, That a letter mailed by the bureau to the insured at his last-known address informing him of the invalidity of his insurance shall be deemed a contest within the meaning of this section: *Provided further*, That this section shall be deemed to be in effect as of April 6, 1917. (Emphasis ours.)

and out of this provision of the law, *which is controlling*, the real questions in this case arise. They are these:

DID THE HAPPENING OF THE CONTINGENCY INSURED AGAINST WITHIN SIX MONTHS FROM DATE OF ISSUANCE OF THE REINSTATED POLICY, AND SO FOUND BY THE VETERANS' BUREAU WITHIN SUCH SIX MONTHS, OPERATE TO SUSPEND THE INCONTESTABLE CLAUSE PROVIDED IN SECTION 307?

AND IF IT DID—

DID THE FINDING OF THE BUREAU ON AUGUST 12, 1925 (WITHIN SIX MONTHS FROM THE ISSUANCE OF THE POLICY), THAT THE INSURED WAS THEN AND HAD BEEN PERMANENTLY AND TOTALLY DISABLED FROM JANUARY 22, 1925 (PRIOR TO THE REINSTATEMENT OF THE POLICY), TOGETHER WITH THE FACT THAT PLAINTIFF WAS ADVISED OF THE CANCELLATION OF THE POLICY, CONSTITUTE A DEFENSE?

The answers to these questions turn on the interpretation of the language "*has been in force*" as found in Section 307 just above quoted. A restatement of the material admitted facts is:

> May 25, 1925. Application for reinstatement marked accepted.
>
> August 12, 1925. Existence of permanent and total disability as determined by defendant and admitted by plaintiff. Also, a determination by defendant that insured became and was permanently and totally disabled from and after January 22, 1925.
>
> June 28, 1927 (Subsequent to). Plaintiff notified by defendant of cancellation of reinstated policy.

Section 411 of the War Risk Insurance Act, which was enacted on August 9, 1921 (42 Stat. 157), provided that the policy, with certain exceptions became incontestable after six months *from date of issuance or reinstatement.*

107162—30——2

When the Bureau came to apply this Section it was found that it was held in a large number of cases that provisions similar to Section 411 as it appeared in the Act of August 9, 1921, did not protect the Bureau unless the policy was contested in court within the six months' period after the issuance of the policy even when the insured had died in the meantime. On the other hand, it was found that the United States Circuit Court of Appeals in the case of the *Mutual Reserve Fund Life Association* v. *Austin*, 142 Fed. 398, 6 L. R. A., N. S. 1064, had indicated that insertion of the words "in continuous force" limited the application of the incontestable clause to the lifetime of the insured, and that the same views have also been indicated by the Supreme Court of Illinois in *Monahan* v. *Metropolitan Life Insurance Co.*, 283 Ill. 136, L. R. A., 1918 D. 1196.

Thereupon the Bureau requested that Section 411 be amended, and on March 4, 1923, said Section 411 was amended (42 Stat. 1527) and made retroactive to April 6, 1917, and therein it was provided that the policy became incontestable "after the insurance *has been in force* six months from the date of issuance or reinstatement." With the passage of the World War Veterans' Act, 1924, said Section 411 was re-enacted as Section 307 (43 Stat. 627) with the same incontestable clause as appeared in Section 411 of the War Risk Insurance Act, as amended by the Act of March 4, 1923, supra.

It is a well-recognized rule of statutory construction that where an amendment is enacted it must be

presumed that the Legislature intended to make a change in the law as it stood previously and the amendment should be so construed as to give effect to this intention. (Black on Interpretation of Law, Section 165.)

To ascertain the intention of Congress resort may be had to the Reports of the Committee in charge of the legislation. (*Duplex Printing Co.* v. *Emil J. Deering*, 254 U. S. 443.)

The Report of the Committee on Interstate and Foreign Commerce on the Bill which afterwards became the Act of March 4, 1923, contains the following:

> Section 9 of the bill amends Section 411 of the present law so that a policy of insurance shall be incontestable after it has been in force six months, instead of providing that the policy shall be incontestable six months after date of issuance or reinstatement. Section 411 now provides that, subject to Section 29, a policy of insurance heretofore or hereafter issued in accordance with article 4 of the War Risk Insurance Act shall be incontestable after six months from date of issuance or date of reinstatement, except for fraud or nonpayment of premiums. The Bureau has found upon investigation that a large number of cases construing a similar proviso in insurance policies have held that the maturity of the policy did not stop the running of the statute, and that the statute could be stopped from running only by action brought in court to cancel the policy. In other words, if an insured paid one month's premium and

no more and died or became permanently disabled within that month the Government would be bound to pay the policy (if the bureau followed these opinions) unless the Government, within six months from the date of issuance of the policy or reinstatement had begun a suit to cancel the policy. *The amendment, instead of providing that the policy shall be incontestable six months after date, provides that it shall be incontestable after the policy "has been in force six months." All the cases hold that where the provision in the policy is that it must be in force six months that the maturity of the policy stops the running of the statute and the insurer can contest.* (Congressional Record, Vol. 64, Part 5, pages 5195, 5196.)

The intent of Congress expressed in the foregoing Committee Report is clear and certain and it must follow that the phrase "has been in force," as it applies to the policy of insurance issued under the War Risk Insurance Act, or its amendments, *means this and just this: that if death or permanent and total disability of the insured happens within six months from the date of issuance of the policy the incontestable clause is suspended.*

If the plaintiff should urge that similar language in ordinary insurance contracts has been interpreted otherwise by the Courts—as admittedly is the fact—hat is something wit h which we are not and can not here be concerned for *in this case we are not dealing with an ordinary contract of insurance* but one commonly known as a war-risk insurance contract, one

which by an unbroken line of decisions is held not controlled by state laws or decisions, and one issued subject to statutes and regulations then existent, or thereafter enacted or promulgated. (*Helmholz et al.* v. *Horst et al.*, 294 Fed. 417; *Sawyer* v. *United States*, 10 Fed. (2d) 416; *White* v. *United States*, 270 U. S. 175.)

Further, the United States Veterans' Bureau, the Department of the Government charged with the administration of war-risk insurance legislation, has from the beginning construed the language "has been in force" in conformity with the clearly expressed intent of Congress as is set out in the foregoing Committee Report.

In an opinion by the General Counsel of the United States Veterans' Bureau rendered June 3, 1924, in the case of Otis L. Sutherland, it was stated:

> The precedents of this office have consistently held that the insured must survive the six months' period prescribed by the statute in order for the incontestable clause to operate. (28 Opinions General Counsel 1440.)
>
> A settled construction by a Department of the Government of the laws of the United States will not be overturned by the courts unless clearly wrong. (*Illinois Surety Co.* v. *United States*, 249 U. S. 214; 60 L. Ed. 609.)

When Congress reenacted Section 307 of the World War Veterans' Act, using the identical language of Section 411 of the War Risk Insurance Act, it knew, or was presumed to know, the construction which had been placed thereon by the Veterans' Bureau; and in reenacting the law without change Congress

impliedly recognized and approved the Veterans' Bureau's construction of the phrase "has been in force" under the rule laid down in the case of *United States* v. *Cerecedo Hermanos Y Compania*, 209 U. S. 337; 52 L. Ed. 821, which holds that:

> The reenactment by Congress, without change, of a statute which has previously received a long-continued executive construction, is an adoption by Congress of such construction.

The question presented in this case is neither new nor novel. The power and authority of the Director of the Veterans' Bureau to determine, *independently and to the exclusion of judicial review*, whether or not an application for reinstatement shall be accepted or rejected, or to determine after reinstatement whether such reinstated policy was validly issued, has been uniformly upheld by the Federal Courts of the United States. In the case of *Jenkins* v. *United States*, 24 Fed. (2d) 452, Jenkins applied for reinstatement of insurance which had previously lapsed. The application was accepted and reinstated insurance issued, but later, upon investigation and reconsideration of the facts, the Director of the Bureau rejected and canceled the reinstated insurance. Following the death of Jenkins, his mother brought suit to recover under said reinstated policy and the court, in holding that the Director's cancellation of said reinstated policy was an exercise of the exclusive power vested in the Director, said:

> True there are some distinctions between the reinstatement of this kind of insurance and

the original acceptance of the ordinary life insurance by a private insurance company. * * * The statute and the regulations, * * * which have the effect of law, disclose a purpose to permit the Director to investigate and determine, with the assistance of evidence supplied by the applicant, whether or not his condition of health is as good as it was when the policy lapsed. It follows that if the Director should find that such equality of health did not exist, he might decline to reinstate. * * * It should be noted that the court has found as a fact that Jenkins was in as good health at the time he made his application for reinstatement as he was on the due date of the premium which was in default, to wit: November 1st; and the question arises as to whether this affirmative finding by the court of the existence of a fact which would have entitled Jenkins to reinstate * * *, may take the place of a determination by the Veterans' Bureau of the existence of such required state of health, based upon true and correct information required by the regulations. I think this question must be answered in the negative. The law and the regulations contemplate an investigation and a determination of the required comparative state of health prior to reinstatement by the Director, and not after death by a court. It is quite conceivable that the Bureau might fairly have arrived at a conclusion different from the court especially in view of its opportunity to examine the insured, if so desired—and have declined to reinstate.

To the same effect are the decisions of the Circuit Court of Appeals for the 9th Circuit in the following cases: *United States* v. *Jensen; United States* v. *Banks; United States* v. *Salisbury* (all 36 Fed. (2d) 47); *Jordan* v. *United States* (36 Fed. (2d) 43). In the *Jordan case,* the 9th Circuit said:

> It is manifest that is was the purpose of Congress to leave the policy open to contest when it matured before it had been in force for the period of six months. * * * Taking the view most favorable to the appellant (the insured against whom judgment below had been rendered) the policies in this case matured through his permanent and total disability before they had been in force six months and therefore the incontestable provision of the statue has no application.

In the case of *United States* v. *Meadows,* 32 Fed. (2d) 440, where the Director of the Bureau had declined to accept an application for reinstatement and where the soldier then brought suits seeking to compel the Director to accept such application for reinstatment, the Circuit Court of Appeals for the 8th Circuit, in reversing a judgment in favor of the soldier, said:

> It has been repeatedly determined that the grant of power given to the Director by Section 2 of the Act of 1921 to decide questions of fact can not be challenged unless the controversy falls within Section 19 of the Act of 1924, as amended by the Act of 1925 (38 U. S. C. A., Section 445) or unless such de-

> cision is "wholly without evidential support, or wholly dependent upon a question of law, or clearly arbitrary or capricious." (*Silberschein* v. *United States*, 266 U. S. 221.)

In the case of United States ex relatione *Finley* v. *Hines* (25 Fed. (2d) 554), a former Director of the United States Veterans' Bureau had made findings upon which insurance was reinstated and benefits thereon subsequently paid to the insured, and where after the death of the insured the then Director of the United States Veterans' Bureau determined that the findings of his predecessor were unsupported by the evidence and cancelled the reinstated policy and declined to pay further benefits. The Court of Appeals of the District of Columbia held, after citing the case of *White* v. *The United States* (270 U. S. 175, 180), wherein Mr. Justice Holmes said:

> The insurance was a contract to be sure, for which a premium was paid, but was not one entered into by the United States for gain. All soldiers were given a right to it and the relation of the Government to them, if not paternal, was at least avuncular. It was a relation of benevolence established by the Government at considerable cost to itself for the soldiers' good.

From this it will be observed that the privileges accorded under the War Risk Insurance Act are to be regarded in the nature of a gratuity and by the express terms of the statute are subject to the discretion of the Director of the Bureau to reconsider, set aside, or vacate

> either his own orders or the orders of his predecessor in office, whenever error or illegality is in his judgment apparent.

While the action in the *Finley case*, from which a quotation has just been made, was one of mandamus, the principle announced therein is none the less applicable to the present case for here the plaintiff, by her demurrer, concedes the correctness of Director Hines' ultimate determination that the insured was permanently and totally disabled prior to the issuance of the policy in dispute and concedes that the insured was so found within six months from the issuance of said policy.

Recalling then that as is provided in Section 304 of the World War Veterans' Act, which is quoted in this brief at page 4, it is the Director of the Veterans' Bureau who determines whether or not insurance shall be reinstated; that within six months from the date of acceptance of application for reinstatement the Director had determined the insured to have become permanently and totally disabled prior to the issuance of this insurance *and it is not contended by plaintiff that such determination is incorrect* much less arbitrary or capricious or within any of the other exceptions laid down in the Silberschein case, supra; that the plaintiff admitted that insured became permanently and totally disabled within six months from the date of the issuance of the policy and that the Bureau had so rated him; that thereafter the Bureau had notified the plaintiff of its action in cancelling the policy; and that *this contract provided that the operation of the*

incontestable clause was suspended if the contingency insured against happened within six months from date of issuance, it must follow that the Trial Court erred in sustaining plaintiff's demurrer.

It is respectfully submitted that the Trial Court should be reversed.

LEO A. ROVER,
United States Attorney.
JOHN W. FIHELLY,
Assistant United States Attorney.
J. O'C. ROBERTS,
Assistant General Counsel.
JAMES T. BRADY,
Attorney, United States Veterans' Bureau.

U S GOVERNMENT PRINTING OFFICE 1930

COURT OF APPEALS,
DISTRICT OF COLUMBIA
FILED

JUN 14 1930

Henry W. Hodges
CLERK.

IN THE

Court of Appeals, District of Columbia

No. 5124

UNITED STATES OF AMERICA, *Appellant*

v.

CASSIE S. BARDWELL, BENEFICIARY OF EMORY CHESTER BARDWELL, deceased, *Appellee*

BRIEF OF APPELLEE

JAMES B. FLYNN,
S. J. L'HOMMEDIEU,
Attorneys for Appellee.

IN THE

Court of Appeals, District of Columbia

No. 5124

UNITED STATES OF AMERICA, *Appellant*

v.

CASSIE S. BARDWELL, BENEFICIARY OF EMORY CHESTER BARDWELL, deceased, *Appellee*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appellee, plaintiff below, is the widow and beneficiary of Emory Chester Bardwell, who, while a soldier in the army during the World War, applied for and was granted a $10,000.00 War Risk Insurance policy. After the War the said insured permitted the said policy to lapse and subsequent thereto he applied for reinstatement of said policy of insurance. Policy was thereupon reinstated by the defendant by and through its duly authorized officers and agents and the insured paid to the defendant all of the lapsed premiums of said policy which were then and there accepted by the defendant.

That the insured fully performed his part of the contract, and paid the subsequent premiums as they matured, and that thereafter on, to wit, August 12th, 1925, after being duly examined by the medical officers of the defendant the insured was rated by the defendant through the Director of the United States Veterans' Bureau as permanently and totally disabled and that thereafter from said August 12th, 1925, to and including June

28th, 1927 (a period of almost two years), he was paid by the defendant monthly insurance installments of $57.50 as in said insurance policy provided.

The insured died June 28th, 1927, and after his death the appellee applied to defendant for the balance of the insurance due under the said policy, but that the defendant, notwithstanding the fact that appellee was the widow of insured and the beneficiary under said policy, refused to pay to her the said balance and appellee thereupon brought this suit.

ARGUMENT

There is but one question in this case and one which should not require the citation of authorities nor any extended argument. That question is: Can the defendant, after a policy of insurance has been in force for almost two years subsequently contest the same in the absence of fraud? No fraud is claimed here.

Section 307 of the World War Veterans' Act (43 Stat. 627) provides as follows:

> "All such policies of insurance heretofore or hereafter issued *shall be incontestable after the insurance has been in force for six months* from the date of issuance or reinstatement . . . ."

Applying the facts to the law as stated above it is clear that this policy is now and was on June 28th, 1927, incontestable for the simple reason that the said "insurance had been in force for six months" and longer. In fact it had been in force on said date, 25 months and 3 days. The defendant cannot now be heard to say that it made a mistake after accepting the fruits of the contract and when it is called upon to perform it's part. Particularly should this be so since the insured's lips

have been sealed by death and his widow, as a result, left without the necessary proof to rebutt the defendant's contention now, for the first time, raised. Indeed, it comes with poor grace from the Director of the Veterans' Bureau, and ill becomes our Government more than two years after the policy had been reinstated, and after the death of the veteran, whose death was caused by his patriotism in defense of his country, to say that the reinstatement was a mistake. The defendant by it's conduct in reinstating this policy and accepting the premiums and subsequently paying 22 installments of insurance to the insured during his lifetime lulled him into a sense of security. This conduct on the part of the defendant would, obviously, have the effect of preventing the insured from taking any action to have the error rectified, if one had been committed. Such conduct deserves the condemnation of all citizens.

In the case of *Mutual Reserve Fund Association* vs. *Austin,* 142 Fed. 398 the policy provided as follows:

> "If this policy of insurance shall have been in continuous force for three years from its date, it shall thereafter be incontestable except for nonpayment of premiums as herein provided or for misstatement of the age of the member in the application therefor, subject to the provisions hereof . . . ."

The application provided:

> "That under no circumstances shall the insurance hereby applied for be in force until payment in cash of the first payment, while the applicant is in good health, and . . . ."

The policy was delivered to insured April 14th, 1897, and he paid the premiums until his death on August 5th,

1902. The Insurance Company resisted payment on practically the same grounds as the defendant here. The Insurance Company contended *that the incontestable clause never took effect for the reason that the policy had never been in force* because the insured was not in good health when the policy was delivered. At the trial it was established that the insured was not in good health, either when the application was made or when the policy was delivered. The Court however held that the insurer was precluded from setting that up as a defense after three years had elapsed from the date of the delivery of the policy. The Court said:

> "The argument that the policy was not in continuous force is predicated upon the extrinsic fact not appearing upon the face of the policy to wit, the fact that the assured was not in good health at the date of the delivery of the policy. In setting up, or even relying upon, this extrinsic fact, the Company is contesting its policy as evidence of its obligation. If the Company is at liberty to set up this fact after the lapse of more than five years it is equally at liberty to set it up after a lapse of more than forty years. Instead of being an incontestable policy if we adopt the defendant's argument, the policy is always contestable."

In the case of *Monahan* vs. *Metropolitan Life Insurance Co.*, 283 Ill. 136, the policy of insurance provided that "after two years this policy shall be non-contestable except for the nonpayment of premiums as stipulated or for fraud."

Patrick H. Fay was the insured and the policy was issued December 12th, 1903. Fay died October 19th, 1905. On October 31st, 1905, an administrator was appointed for his estate and the insurance not being paid

the administrator brought this suit on January 23rd, 1906. The Insurance Company defended on the ground that the insurance must be in force for two years during the lifetime of the insured before this provision became a bar, but the Court held otherwise. The Court said:

> "Incontestable provisions in insurance policies have been held valid as creating a short statute of limitations in favor of the insured, the purpose of such provisions being to fix a limited time within which the insurer must ascertain the truth of the representations made. (*Royal Circle* vs. *Achterrath* 204 Ill. 549; *Flanigan* vs. *Federal Life Ins. Co.*, 231 id. 399; *Weil* vs. *Federal Life Ins. Co.*, 264, id. 425)."

In the case of *Healy* vs. *Metropolitan Life Ins. Co.*, 37 App. D. C. 245, this Court held that a policy of life insurance was voidable only for the period provided in the incontestable clause. The Court speaking through Mr. Justice Robb said:

> "After two years from the date of the policy it is incontestable, except for fraud, the provision in the incontestable clause relating to misstatement of age being inconsistent with and controlled by the other provisions in reference to the same subject the policy was therefore in force from its date and voidable for two years upon the grounds reserved therein, *but not thereafter*, except for fraud."

Counsel contend that the insured here became permanently and totally disabled within six months from the date of reinstatement and that this constituted a maturity of the policy and contend further, that this would stop the running of the incontestable clause in the Act heretofore referred to. It is, indeed, difficult to fol-

low the reasoning of Counsel as the policy would mature only upon death of the insured and not upon his becoming disabled. As authority for their contention they cite the report of the Committee on Interstate and Foreign Commerce as follows:

> "All the cases hold that where the provision in the policy is that it must be in force six months that the maturity of the policy stops the running of the *statute* and the insurer can contest."

It does not appear from this report *what statute* the Committee was speaking about nor does it say that a policy would mature upon the disability of the insured.

It is safe to assume that had Congress intended that the incontestable clause should be suspended upon the disability of the insured being asceretained within the six month period, that it would have said so in apt words and enacted that intention or desire into law.

It must be observed, however, that a committee of Congress cannot change the law by merely stating that all the cases hold something which they do not hold. A review of the reported cases hold just the contrary to what this committee's report said they hold.

In the case of *Ramsay* vs. *Old Colony Life Ins. Co.*, 297 Ill. 592, one Klevicska took out an insurance policy with defendant on September 7th, 1916, and on April 13th, 1917, he died. Policy was payable to his estate and administrator was appointed on July 19th, 1918, who brought action on the policy November 7th, 1918. The policy had a one-year incontestable clause. The Court held that the death of insured did not stop the running of the incontestable clause but only suspended it until the administrator was appointed. The Court said, Pg. 603:

"The death of the insured within the year did not remove the contractual limitation upon the right of the company to contest its liability on the policy, but the fact that without the fault of the company there was no party in existence against whom it could begin suit, and that it had no power to have and administrator appointed for that purpose, suspended the operation of this provision until an administrator was appointed."

And in the case of *Mutual Ins. Co.* vs. *Hurni Co.*, 263 U. S. 167, the Court held that the death of the insured does not stop the running of the incontestable clause. The Court said, pages 176-177:

"Second. The argument advanced in support of the second ground relied upon for reversal, in substance, is that a policy of insurance necessarily imports a risk, and where there is no risk there can be no insurance; that when the insured dies what had been a hazard has become a certainty; and that the obligation then is no longer of insurance, but of payment; that by the incontestability clause the undertaking is that after two years, provided the risk continues to be insured against for the period, the insurer will make no defense against a claim under the policy; but that if the risk does not continue for two years, (that is, if the insured dies in the meantime), the incontestability clause is not applicable. Only in the event of the death of the insured after two years, it is said, will the obligation to pay become absolute. The argument is ingenious but fallacious, since it ignores the fundamental purpose of all simple life insurance, which is not to enrich the insured, but to secure the beneficiary, who has, therefore, a real, albeit sometimes only a contingent interest in the policy."

"It is true, as counsel for petitioner contends, that the contract is with the insured and not with the beneficiary; but, nevertheless, it is for the use of the

beneficiary, and there is no reason to say that the incontestability clause is not meant for his benefit as well as for the benefit of the insured. It is for the benefit of the insured during his lifetime, and upon his death immediately inures to the benefit of the beneficiary. As said by the Supreme Court of Illinois in *Monahan* v. *Metropolitan L. Ins. Co.*, 238 Ill. 136, 141, L. R. A. 1918D, 1196, 119 N. E. 68:

'Some of the rights and obligations of the parties to a contract of insurance necessarily become fixed upon the death of the insured. The beneficiary has an interest in the contract, and, as between the insurer and the beneficiary, all the rights and obligations of the parties are not determined as of the date of the death of the insured. The incontestable clause of a policy of insurance inures to the benefit of the beneficiary after the death of the insured as much as it inures to the benefit of the insured himself during his lifetime. The rights of the parties under such an incontestable clause as the one contained in this contract do not become fixed at the date of the death of the insured.'

In order to give the clause the meaning which the petitioner ascribes to it, it would be necessary to supply words which it does not at present contain. The provision plainly is that the policy shall be incontestable upon the simple condition that two years shall have elapsed from its date of issue;—not that it shall be incontestable after two years if the insured shall live, but incontestable without qualification and in any event. See *Monahan* v. *Metropolitan L. Ins. Co. supra; Ramsey* v. *Old Colony L. Ins. Co.* 297 Ill. 592, 601, 131 N. E. 108; *Ebner* v. *Ohio State L. Ins. Co.* 69 Ind. App. 32, 42-48, 121 N. E. 315; *Hardy* v. *Phoenix Mut. L. Ins. Co.* 180 N. C. 180, 104 S. E. 166, 168, 169."

In the case of *Jefferson Standard Life Ins. Co.* v. *McIntyre et al.*, 294 Fed. 886, the policy contained a clause

that "After this policy shall have been in force for one full year from the date hereof, it shall be incontestable for any cause except for non-payment of premiums."

The Court held that the death of the insured within one year does not stop the running of the incontestable clause. The Court said:

> "Nothing in the language of the provision in question indicates the existence of an intention to make the effectiveness of it dependent upon the insured remaining alive for one full year from the date of the policies."

From the above authorities, including the highest Court in the country, it is apparent that the maturity of the policy does not stop the running of the incontestable clause as alleged by Counsel, and it is apparent that the committee in Congress was either misled or misinformed when it made its report hereinbefore referred to. Obviously, this Court should not make the same error as the committee, and thus by judicial sanction establish as law that which is not.

There are two other reasons why the Court below should be sustained and they are as follows:

1. That no letter was mailed to the insured informing him of the invalidity of his insurance although he lived almost two years after the time when the insurance is now claimed to have been invalid, and

2. The record fails to disclose that the defendant ever, at any time, tendered back to the insured or his beneficiary the premiums paid by the insured.

Section 307 of the World War Veterans' Act, (43 Stat. 627), after stating the incontestable provision of the policies such as the one in this case said:

> "Provided, that a letter mailed by the bureau to the insured at his last known address informing him of the invalidity of his insurance shall be deemed a contest within the meaning of this section."

Obviously, it was the intention of Congress that if the bureau should decide that a veterans' policy was invalid for any reason that they should notify him within a reasonable time so that he could make his defense, if any he had. This is very apparent from the words used in the Act, namely, "shall be deemed a contest . . . ." It does not need the citation of authority to prove that the word "contest" imports a defense to a claim or resisting a claim. The record fails to disclose that at any time during the life of the veteran was he advised by letter or otherwise that the bureau claimed his insurance was invalid, although the policy was reinstated May 25, 1925, and he lived until June 28, 1927. The bureau had two years in which to inform him of the alleged invalidity, and thereby to have given him the opportunity to which all American citizens are entitled, to defend himself. Instead of doing this they continued to pay him monthly installments of $57.50 as provided by the policy from August 12th, 1925, to June 28th, 1927, and thereby lulled him into a sense of security and prevented him from taking any affirmative action. If there were no other reason why the Court below should be sustained this would be sufficient as such conduct on the part of the defendant would estop it from claiming that the policy was invalid.

If the policy was, in fact, invalid, why is it that no tender has ever been made of the premiums paid by the insured? It would be unjust and inequitable to allow the defendant to accept the fruits of the contract while at the same time denying its liability thereunder.

Counsel do not discuss the first assignment of error in their brief, and, therefore, we will not discuss it here, but in fairness to the learned Justice below we think it should be called to the attention of this Court that the Court below did not hold "that the *plaintiff* had the right to reinstate his contract of War Risk Insurance at a time when *he* was permanently and totally disabled." The record discloses that the plaintiff in this case is a woman and the wife of the veteran (R. 1), and that she never reinstated a War Risk policy, but rather her husband did (R. 1). The record also fails to disclose that the learned Justice held that the insured had the right to reinstate his policy when he was permanently disabled. Plaintiff's demurrer to defendant's plea was sustained for the reason therein stated, namely, Section 307 of the World War Veterans' Act.

Counsel quote at length from the case of *Jenkins* vs. *United States,* 24 Fed. (2nd) 452. That case has no bearing on the case at Bar as the Jenkins case comes within one of the exceptions to the incontestable statute, i. e. fraud. The facts in that case are that after Jenkins' policy lapsed he applied for reinstatement and in the application in answer to the question as to whether or not he consulted a physician since the policy lapsed said, "No." The Court in speaking of this said:

> "Ostensibly there was (a contract of insurance); but it is now determined that, in the course of securing it, he falsely represented certain facts material to the risk. That vitiates the contract."

Counsel also cite the cases of *United States* vs. *Meadows,* 32 Fed. (2nd) 440; *Silberschein* vs. *United States,* 266 U. S. 221; *United States ex rel. Finley* vs. *Hines,* 25 Fed. (2nd) 544. These cases are mandamus cases and

have no bearing on the issue here involved. In these cases the Court simply held that a discretionary act of the Director could not be controlled by mandamus, at least unless arbitrary or capricious.

In the case of *United States ex rel. Finley* vs. *Hines, supra,* quoted at length by counsel they stop their quotation in the middle of a paragraph and when the omitted part is added to the part quoted it casts an entirely different light on the question under consideration. The part omitted is as follows:

> "It follows that the jurisdiction thus conferred upon the Director is closely analogous to that of the Commissioner of Pensions, and is not subject to control by mandamus."

The Court in the case of *Finley* vs. *Hines* held that the plaintiff there should have sued at law the same as the plaintiff has done in this case. The Court after citing Section 2 of the Act of Congress of March 4, 1925, 43 Stat. 1302, which allowed the prosecution of actions at law in cases such as this one, said:

> "Without stopping to discuss the right of the plaintiff to still assert her claim in Court, and have the date of disability of the insured ascertained and adjudicated, or whether by the present procedure this right would be deemed to have been waived, it would seem that a full and complete remedy at law is afforded, which, in the absence of the conclusive statutory limitations heretofore considered, would be sufficient in itself to bar the remedy here invoked."

It is respectfully submitted that the judgment of the lower Court was correct and should be affirmed.

JAMES B. FLYNN,
S. J. L'HOMMEDIEU,
Attorneys for Appellee.